MARCUS DING & ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT BORNEO, SIBU
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. 22 OF 1990]
8 NOVEMBER 1990

CIVIL PROCEDURE: *Setting aside Magistrate's order - Commence afresh or retrial - Powers of Appellate Court - Alter or reverse - Cannot remit for trial - Duty of Magistrate.*

CRIMINAL PROCEDURE: *Good behaviour bond - Breach of peace - Inappropriate bond - Importance of information - Accused not named nor identified - Duty of Magistrate as regards information - Whether offence 'proved' - Failure of justice - Criminal Procedure Code, ss. 67, 73(i) and 74.*

The Magistrate in the Court below ordered that its appellants in this case execute bonds and furnish sureties; this order was made after proceedings were brought against the appellant under ss. 67, 68 and 69 of the Criminal Procedure Code (CPC) which deals with offences of breaches of peace.

The appellants are appealing the Magistrate's decision and the issue for the Court was whether the Magistrate had acted in accordance with the relevant provisions of the CPC.

Held:

[1] Since the proceedings in the instant case were under s. 67, the use of the phrase "Bond of Good Behaviour" is inappropriate.

[2] (a) The foundation of requiring a person to show cause under s. 67 is information. In the statements produced, none of the 14 appellants were named or specifically mentioned nor in any manner identified.

(b) on the information *per se* as contained in the statements, it was difficult to see how the 14 appellants could be required to show cause.

[3] (a) Under s. 74 of the CPC, a Magistrate is under a duty to satisfy himself by an inquiry of the truth of the information on which he had required cause to be shown under s. 67;

(b) from the note of proceedings it is clear that the Magistrate's findings were arrived at by examining the letters of the "Brief facts of the case" after the 14 appellants had expressed no more than that they understood it. Furthermore, from the words "The accuseds have been alleged" used in the grounds of decision, the information, apart from the absence of any identification of the persons concerned as stated earlier, is far from capable of being said to have been "proved".

[4] The Magistrate had failed to act in accordance with the relevant provisions of the CPC and a failure of justice had occasioned.

[5] The High Court, sitting as an Appellate, can only alter or reverse the order appealed against. It was doubtful whether the Court in its appellate jurisdiction, can remit this case to the lower Court for retrial.

[6] However as in this case, as the quality of information laid which did not include any identification of any of the 14 appellants, this was not a proper case for an order of retrial.

[Appeal allowed. committed and bond order set aside.]

Case referred to:
Toh Seng Chor & Ors. v. PP [1948-49] MLJ Supp 35

Legislation referred to:
Criminal Procedure Code, s. 67

For the appellants - Cheng Hui Hong (Wong Sing Nang with him); M/s. Cheng & Cheng
For the respondent - Nik Suhaimi bin Nik Sulaiman, DPP

JUDGMENT

Chong Siew Fai J:

This is an appeal by the 14 appellants against the orders of the Magistrate's Court at Belaga:

(1) requiring them each to execute a bond of "Good behaviour for keeping peace" with one surety in the sum of RM300; and

(2) committing them each to 6 weeks' imprisonment or "until such time they are able to secure sureties as to release them on "Bond of Good Behaviour". (This second order was made after the appellants refused to furnish sureties).

In making order (1) order, this is what the Magistrate said:

> After examining the brief facts of the case put forward by the prosecution it was found that certain extent of public disorder has been created by the accuseds. They have stopped workers employed by the camp in exercise (*sic*) their daily duties whereas UMAS Sdn. Bhd. had been given Timber Licence No. 7/3249 by the State Government. The accuseds have been alleged to threaten security and peace of workers employed by the Syarikat UMAS Sdn. Bhd. operating logging in the area. They wish to take the law into their own hands without going through proper authority.
>
> In the interests of public peace I therefore order all the 14 accused persons to be released on Bond of Good Behaviour for keeping peace for a period of six months with one surety and in the sum of RM300 each.

There are unsatisfactory features in this case which, according to the note of proceedings, appeared to have been brought under s. 67 of the Criminal Procedure Code.

(All the sections referred to below are sections in the Criminal Procedure Code).

1. Proceedings under s. 67 are intended to prevent persons from doing something which is likely to or may probably cause a breach of the peace as opposed to the want of good behaviour which is under ss. 68 and 69. Apart from the wording of the 3 sections, the view that such a distinction exists is also supported by the different forms e.g. Forms X, XI, XII and XIII set forth in the Second Schedule to the Criminal Procedure Code. Therefore, since the proceedings in the instant case were under s. 67, the use of the phrase "Bond of Good Behaviour" is, strictly speaking, inappropriate.

2. The foundation of requiring a person to show cause under s. 67 is information. So far as may be gathered from the documents attached to the note of proceedings in the instant case, the basis upon which the 14 appellants were required to show cause, was the statement entitled "Production U/Sec 67 CPC" with the words written in pencil

thereon in the original. In the statement none of the 14 appellants was named or specifically mentioned nor in any other manner identified. On the information *per se* as contained in the statement, it is difficult to see how the 14 appellants could be required to show cause.

3. Before making an order for the execution of a bond under s. 74, a Magistrate is under a duty to satisfy himself by inquiry of the truth of the information on which he had required cause to be shown under s. 67 including, if necessary, the taking of further evidence. Section 73(i) and s. 74 which provides: "If ... it is proved" See also *Toh Seng Chor & Ors. v. Public Prosecutor* [1948-49] MLJ Supp 35. The note of proceedings in the instant case shows that the "brief fact of the case" was merely read and explained to the 14 appellants in Court who expressed that they understood it. Then followed a reference by the prosecuting officer of a criminal case which bore no relevance to the instant one after which the Magistrate gave his grounds and order (1) mentioned above.

It appears clear from the note of proceedings that the Magistrate's findings of the creation of public disorder and interference of the workers' daily duties by the 14 appellants were arrived at by examining the cold letters of the "Brief fact of the case" after the 14 appellants had expressed no more than that they understood it. Furthermore, from the words "The accuseds have been alleged" used in the grounds of decision, the information, apart from the absence of any identification of the persons concerned as stated earlier, is far from capable of being said to have been "proved".

On the material and evidence before me and for the above grounds, I am compelled to hold that the Magistrate had failed to act in accordance with the relevant provisions of the Criminal Procedure Code and that a failure of justice had occasioned. The appeal is allowed. The order to execute the bonds and the committal order against the 14 appellants are hereby set aside.

In fairness, I ought also to state that Encik Nik Suhaimi for the prosecution had candidly conceded the orders appealed against being unsustainable.

For the prosecution it was urged upon me to permit the matter to commence afresh (as opposed to a retrial) if the prosecution chooses so to do. I do not think I can do that. This Court, sitting as an Appellate Court, can only alter or reverse the order appealed against (s. 316(c)). It is doubtful whether this Court, in its appellate jurisdiction, can remit this case to the lower Court for a retrial. But even if it can, having regard to the quality of the information laid which did not include any identification of any of the 14 appellants, I am satisfied that this is not a proper case for an order of retrial.

Also found at [1991] 1 CLJ 549